HWG | HARRIS, WILTSHIRE & GRANNIS LLP

November 9, 2017

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Bridging the Digital Divide for Low-Income Consumers*, WC Docket No. 17-287; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42; *Telecommunications Carriers eligible for Universal Service Support*, WC Docket No. 09-197

Dear Ms. Dortch:

On November 8, 2017, on behalf of Q Link Wireless, LLC, I separately met with: Jamie Susskind, Chief of Staff to Commissioner Carr; Amy Bender, Legal Advisor to Commissioner O'Rielly; and Claude Aiken, Legal Advisor to Commissioner Clyburn. On November 9, 2017, I separately spoke with Travis Litman, Chief of Staff and Senior Legal Advisor to Commissioner Rosenworcel, Trent Harkrader, Associate Chief, Wireline Competition Bureau, and Jodie Griffin, Deputy Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, with respect to the draft Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry (FCC-CIRC1711-05) ("*Draft Order*"), which was publicly released on October 26, 2017. Specifically, I addressed the draft order on reconsideration which would eliminate all port-freezes 60 days after publication in the Federal Register.

As explained in my letter of November 6, 2017, copies of which were provided to Ms. Susskind, Ms. Bender, Mr. Aiken, and Mr. Littman, the timing of the proposed elimination of port freezes would once again subject the Lifeline program to rampant flipping. Concerns about flipping were the reason that USAC administratively adopted a 60-day port freeze long before the *Third Report and Order*, which codified and, in the case of broadband plans, extended them to twelve months.[1] Flipping and churning led to news programs filming customers collecting multiple Lifeline phones, to the detriment of the program.

While the potential for flipping to lead to multiple support payments for the same customer in a given month has been curtailed by the requirement to report on Form 497 Lifeline eligible customers served on the first day of the month, as a snapshot, reintroducing flipping will create a significant FCC-mandated exposure to fraud for all Lifeline providers. The Commission

1 *See Lifeline and Link-up Reform and Modernization, et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd. 3962, 4105-4108 ¶¶ 387-394 (2016).

should not, in the name of consumer choice, subject Lifeline providers to potentially significant consumer fraud. Prevention of fraud against the carriers—stemming from the confluence of other Lifeline rules that were each adopted for their own good reasons and which cannot be addressed without a port freeze of some duration—makes this not just a matter of private contract between carriers and their customers, but for Commission regulation.

Under current rules, Lifeline providers must provide Lifeline service to any eligible customer that requests service.[2] For mobile Lifeline providers, that service must include a minimum of 500 MB per month of data (increasing to 1 GB on December 1, 2017) or 500 voice minutes (increasing to 750 minutes on December 1, 2017).[3] Moreover, the Commission has essentially required that all mobile devices provided to the consumer are smartphones, in order to meet the Wi-Fi enabled and hotspot requirements.[4] In addition, the Commission has adopted a rule that providers may only report on Form 497, and thus be compensated for, eligible Lifeline customers that they are serving on the first day of the month. Due to the current port freezes, providers are not required to provide unreimbursed service to eligible Lifeline consumers because the consumer cannot port to another provider before the provider can be compensated for service at the start of the month following the customer porting in.

Without a port freeze, a Lifeline consumer could commit service fraud simply by porting from one Lifeline provider to another. Each Lifeline provider would be obligated by rule to provide the customer with a full month's allocation of data or voice service. When the customer exhausted the first provider's service, he or she could then simply port to another provider and obtain a new full month's allocation of data or voice service. This could be repeated multiple times within the month. And, by FCC rules, in the absence of a port freeze, every Lifeline provider would be required to provide the service, but only one—the provider serving the customer on the first day of the month—would be reimbursed. Similarly, if the Lifeline provider subsidizes handsets, the customer could receive multiple provider-subsidized handsets in a given month. Moreover, Lifeline providers cannot protect themselves from this abuse. The rules do not make the Lifeline providers' obligation to provide discounted service to an eligible Lifeline consumer contingent upon the consumer remaining a customer until the first day of the month. In any event, imposing an early termination fee on Lifeline consumers would be an exercise in futility, given that these consumers are poor and have difficulty paying any additional amounts for service.

It is thus not reasonable for the Commission deliberately to construct a system of rules that forces Lifeline providers to provide uncompensated, unreimbursed Lifeline service, as removal of all port freezes would do. The only way to prevent this service fraud against Lifeline providers is to have a port freeze that is at least long enough to close the opportunity for uncompensated service.

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[2] *See* 47 C.F.R. § 54.405(a).

[3] *See* 47 C.F.R. § 54.408(b)(2)-(3).

[4] *See* 47 C.F.R. § 54.408(f).

To determine the appropriate length of a port freeze, the Commission should conduct a cost-benefit analysis. Consumers see some benefits from the ability to move freely from one provider to another. But unfettered consumer choice has offsetting harms or costs to consumers. These increased costs or harms, even if not borne by the fund, have a direct impact on Lifeline consumers. Costs incurred to provide unreimbursed service in a month directly limit a provider's ability to provide more service for the same amount of USF support, and costs for phones provided to churning customers similarly limit the overall package that providers can offer to low-income consumers. This is the case whether the service and handsets are offered at no charge to the end users, or at a modest, but reduced charge to the end users.[5] And these impacts will only worsen as the amount of prescribed minimum data or voice service increases. The *Draft Order* does not consider these or other offsetting harms to consumers from elimination of port freezes. In California, for example, during the period in which no port freeze was in effect, average customer life with a Lifeline provider reportedly was about half of what it was after the port freeze took effect. Eliminating port freezes will predictably harm consumers by reducing the quality of handsets and service packages available to Lifeline consumers, because handset and customer acquisition costs that can be amortized over a longer average customer life with a port freeze will now have to be recovered over a shorter period. This is especially true with respect to broadband, as 75 percent of Lifeline subscribers are now on broadband plans.[6] Because the *Draft Order* fails to consider the costs to consumers of eliminating port freezes along with the asserted benefits, eliminating port freezes would be arbitrary and capricious because it fails entirely to consider these important aspects to the issue.[7] Accordingly, the Commission should move the consideration of the elimination (or retention) of port freezes to the NPRM portion of the draft in order to more carefully examine the cost-benefit tradeoffs between unfettered consumer choice in the absence of port freezes and increased costs to providers from fraud or providing multiple provider-subsidized handsets to the same customer.

At a very minimum, the Commission should not reduce data and voice port freezes below the original 60 days USAC originally administratively adopted until it completes its consideration of the various proposed waste, fraud, and abuse safeguards in the NPRM. For example, the draft NPRM proposes, *inter alia*, to eliminate sales agent commissions and to require sales agents to register with USAC.[8] Although these steps would not eliminate FCC-

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5 With respect to handsets, this effect is exacerbated by the de facto requirement for smartphones.

6 *See* Letter from John Heitmann and Joshua Guyan, Counsel to the Lifeline Connects Coalition et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 17-287, 11-42, and 09-197, at 2 (filed Nov. 7, 2017) ("Lifeline Connects Nov. 7, 2017 Ex Parte"), citing the USAC Lifeline Disbursement Tool.

7 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem . . . .").

8 *Draft Order* at ¶¶ 87, 89.

mandated exposure of Lifeline providers to consumer fraud, they would at least mitigate the incentives for sales agents to promote rapid flipping.

In response to questions about the NPRM portion of the *Draft Order*, I stated that the proposal to eliminate non-facilities-based providers from Lifeline was contrary to several decades of Commission policy to permit non-facilities-based service as a means of improving the performance of markets through competition. Non-facilities-based providers are instrumental in targeting and serving niche markets that large facilities-based providers do not have the specialized knowledge or marketing resources to target. This has been seen in both domestic and international long distance calling, and in the rise of non-Lifeline prepaid wireless services. The same is true with respect to Lifeline services, with nearly 70% of all Lifeline subscribers served by wireless resellers.[9] As CTIA points out, "[t]he fact that non-facilities based mobile wireless providers have responded to low-income consumer needs and the vast majority of eligible Lifeline subscribers have chosen these providers should help shape Lifeline policies."[10] CTIA continues, "the Commission has recognized the important role that non-facilities based wireless providers play in the U.S. wireless market to tailor service plans and offerings to low-income consumers' needs."[11] Moreover, by assuming the marketing costs and regulatory risks, non-facilities-based providers are a cost effective way to aggregate demand for facilities-based providers, who then collect their wholesale charges to support the network deployment and costs of maintaining and operating the underlying facilities-based network.

Please contact me if you have any questions regarding this matter.

Sincerely,

John T. Nakahata
Counsel to Q Link Wireless, LLC.

cc: Nicholas Degani
Jay Schwarz
Trent Harkrader
Ryan Palmer
Jodie Griffin
Claude Aiken
Amy Bender
Travis Littman
Jamie Susskind

Attachment

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9 Lifeline Connects Nov. 7, 2017 Ex Parte, at 2.

10 Letter of Meredith Atwell Baker, President and CEO, CTIA, to Chairman Pai, and Commissioners Clyburn, O'Rielly, Carr, and Rosenworcel, WC Docket Nos. 17-287, 11-42, and 09-197, at 3 (filed Nov. 8, 2017).

11 *Id*.

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November 6, 2017

Ex Parte

Ms. Marlene H. Dortch
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Federal Communications Commission
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Re: *Bridging the Digital Divide for Low-Income Consumers*, WC Docket No. 17-287; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42; *Telecommunications Carriers eligible for Universal Service Support*, WC Docket No. 09-197

Dear Ms. Dortch:

On November 2, 2017, on behalf of Q Link Wireless, LLC, I spoke separately with Jay Schwarz, Legal Advisor to Chairman Pai, and Jodie Griffin, Deputy Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, with respect to the draft Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking and Notice of Inquiry (FCC-CIRC1711-05) ("*Draft Order*"), which was publicly released on October 26, 2017. Specifically, I addressed the draft order on reconsideration which would eliminate all port-freezes 60 days after publication in the Federal Register.

Setting aside whether or not the elimination of all port freezes is good policy (Q Link believes it is not good policy), the timing of the proposed elimination of port freezes would once again subject the Lifeline program to rampant flipping. Concerns about flipping were the reason that USAC administratively adopted a 60-day port freeze long before the *Third Report and Order*, which codified and, in the case of broadband plans, extended them to twelve months.[1] Flipping and churning led to news programs filming customers collecting multiple Lifeline phones, to the detriment of the program.

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The Commission should move the consideration of the elimination (or retention) of port freezes to the NPRM portion of the draft in order to more carefully examine the cost-benefit tradeoffs between unfettered consumer choice in the absence of port freezes and increased costs to providers from fraud or providing multiple provider-subsidized handsets to the same customer. These increased costs, even if not borne by the fund, have a direct impact on Lifeline consumers. Costs incurred to provide unreimbursed service in a month directly limit a provider's ability to provide more service for the same amount of USF support, and costs for phones provided to churning customers similarly limit the overall package that providers can offer to low-income consumers. This is the case whether the service and handsets are offered at no charge to the end users, or at a modest, but reduced charge to the end users.[5] And these impacts will only worsen as the amount of prescribed minimum data or voice service increases. The *Draft Order* does not consider these or other offsetting harms to consumers from elimination of port freezes. Eliminating port freezes will also predictably harm consumers by reducing the quality of handsets and service packages available to Lifeline consumers, because handset and customer acquisition costs that can be amortized over a longer average customer life with a port freeze will now have to be recovered over a shorter period. Because the *Draft Order* fails to consider the costs to consumers of eliminating port freezes along with the asserted benefits,

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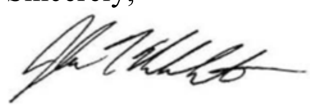
5 With respect to handsets, this effect is exacerbated by the de facto requirement for smartphones.

eliminating port freezes would be arbitrary and capricious because it fails entirely to consider these important aspects to the issue.[6]

At a very minimum, the Commission should not reduce data and voice port freezes below the original 60 days USAC originally administratively adopted until it completes its consideration of the various proposed waste, fraud, and abuse safeguards in the NPRM. For example, the draft NPRM proposes, *inter alia*, to eliminate sales agent commissions and to require sales agents to register with USAC.[7] Although these steps would not eliminate FCC-mandated exposure of Lifeline providers to consumer fraud, they would at least mitigate the incentives for sales agents to promote rapid flipping.

Please contact me if you have any questions regarding this matter.

Sincerely,



John T. Nakahata
Counsel to Q Link Wireless, LLC.

cc: Jay Schwarz
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[6] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem . . . .").

[7] *Draft Order* at ¶¶ 87, 89.